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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

WRIT PETITION NO. 3947 OF 2000

Rohinjan Taloja Vibhag Vidya
Prasarak Mandal and Anr.

... Petitioners.

V/s.

State of Maharashtra and Ors.

... Respondents.

with

WRIT PETITION NO. 5690 OF 2000

Shri Appasaheb Tatyasaheb Kumbhar.

... Petitioner.

V/s.

Rohinjan Taloja Vibhag Vidya
Prasarak Mandal and Ors.

... Respondents.

Mr. V.K. Bodhare i/b. A.M. Joshi for the Petitioners in WP 3947/00
and for Respondents 1 & 2 in WP 5690/00.

Mr. Subhash Langote for the Petitioner in WP 5690/00 and for
Respondent No. 3 in WP 3947/00.

Ms. Vaishali Nimbalkar, AGP for Respondents 1 and 2 in WP
3947/00 and for Respondent 3 in WP 5690/00.

CORAM : N.M. JAMDAR, J.

DATE : 23 OCTOBER, 2015.

ORAL JUDGMENT :-

Both these Petitions challenge the order passed by the School Tribunal, Pune dated 19 March 1999 setting aside the order of termination of the Teacher i.e. the Petitioner in Writ Petition No. 3947 of 2000 against the Management who is the Petitioner in Writ Petition No. 5690 of 2000.

2. By the impugned order the Management is directed to reinstate the Teacher with effect from 1 May 1994 with the back wages to the extent of 25%. The School Tribunal has also recommended that the State Government to pay the back wages to the Teacher and the same can be deducted from the grant payable to the Management and to be paid to the Teacher directly.

3. According to the Teacher concerned, he and his wife were employed with the Management. His services were terminated on 21 March 1994. He challenged his termination by an Appeal No. 158 of 1994. The Appeal was resisted by the Management on the ground that the Teacher was not appointed on clear and permanent vacancy. They contended that he was appointed in a vacancy reserved for backward class (scheduled tribe) and sought for dismissal of the Appeal. The Tribunal came to the conclusion that the appointment of the Teacher was on clear and permanent vacancy and the Management did not prove that

his services were not satisfactory. The Tribunal held that the termination was illegal and void and passed the impugned order as above.

4. Writ Petition No. 5690 of 2000 is filed by the Management challenging the direction regarding reinstatement of the Teacher. As regard the 25% back wages, the Management has prayed that the back wages are admissible by way of salary grant as nobody was appointed on the said post. It was in Writ Petition No. 5690 of 2000 which was subsequently filed by the Teacher. He has questioned the order of the Tribunal in not granting full back wages to the Teacher.

5. The Petitions are being adjourned from time to time and the Court had recorded earlier that Counsels were only taking time and were not interested in going on with the matter. The Petitions were placed on board today for dismissal. I have heard Mr. Subhash Langote, learned Counsel for the Teacher and Mr. V.K. Bodhare, learned Counsel for the Management.

6. Mr. Langote submitted that the Tribunal has not given any reasons as to why 100% back wages were given and the order is bad in law. The learned Counsel submitted that the Teacher was employed during 20 January 1998 and 15 March 1998 in School at Sangli and thereafter, from 1 March 1998. Even as on today, the Teacher is employed in some other school. While issuing rule in

the Petition, this Court has noted that the Teacher is employed in some other school and he is not pressing for reinstatement in the school run by the Management.

7. While commenting on the law laid down by the Apex Court in the case of *Deepali Gundu Surwase v/s. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and Ors.*¹, Mr. Langote submitted that the observations of the Apex Court made therein are in respect of a workman and even while specifying the principles in paragraph 38.3, the Apex Court has prefixed the principle by stating ordinarily. He submitted that in case of teacher a presumption must follow that the Teacher is not employed after his termination.

8. It is not possible to accept such sweeping propositions which are not founded on any legal principle. The case of *Deepali Surwase* arose from the order of the School Tribunal and is surprising how the learned Counsel can submit that it was the case of a workmen. The Apex Court in the case of *Deepali Surwase* has in fact reiterated the settled law that the burden and proof of existence of a particular fact, lies on the person who makes the assertion. Once this assertion is made, the burden shifts on the other party to disprove the same. The Apex Court has stated that the burden to prove existence of a positive fact is easier to discharge than a negative fact. However, the initial burden of

1. (2013) 10 SCC 324

making an assertion is not diluted. Mr. Langote submitted that before the decision of the Apex Court, there was no such practice followed in the Tribunal. Even this argument cannot be accepted. In the case of *Deepali Surwase* (supra), the Apex Court has taken review of earlier position of law and has only culled out principles emerging therefrom.

9. Even assuming a latitude is to be granted to the teacher on the ground of lack of pleadings before the Tribunal, one would have expected that while challenging the order of the Tribunal, a positive assertion is made in the Petition. I have gone through the Petition filed by the teacher. The facts stated therein are from paragraphs 1 to 11 of the Petition. There is not a single positive assertion that from the date i.e. the date of termination i.e. 31 March 1994, till 19 March 1999 i.e. the date of the order of the tribunal, the Petitioner was unemployed. The object of insisting on verification is that whatever stated by the Petitioner is on oath. If a particular position of fact is not stated therein and which is relevant for decision of the controversy, the presumption arises that a statement on oath was not made because the position did not exist. Mr. Langote submitted that the Petitioner had disclosed the dates from which he was working. This averment will not help the Petitioner as he merely states that he was working during the specified period therein. As stated earlier, a latitude could not have been given for lack of specific pleadings in the Appeal, if at all permissible in law, but not so when the

Petitioner specifically challenges the order of deprivation of back wages for a particular period. Mr. Langote has taken me through the pleadings in the Petition and has tried to mix together various averments and submitted an inference can be drawn that the Petitioner was not gainfully employed during the relevant period. But once the Petitioner was challenging the order of the Tribunal depriving him of full back wages, the natural assertion would have been that even though he was not gainfully employed during the relevant period, he was rightfully deprived. As stated earlier, there is no such assertion even in the Petition. Therefore, once the initial burden itself is not discharged, even in the petition, it is not possible to grant any relief to the Teacher. Mr. Langote sought to rely on some statements made in the Writ Petition in the affidavit in reply filed in Writ Petition No. 3947 of 2000 filed by the Management. However, in that Petition, the Management was not putting the fact, which is relevant in this Petition, to issue. If the Teacher is to succeed in his challenge to the impugned order on the basis of a existence of a particular position, it is elementary it must specifically pleaded. Inspite of any pleading the Tribunal has granted 25% back wages to the Teacher. Therefore, no interference is possible with the impugned order in writ jurisdiction, which is a limited one. The Writ Petition is accordingly rejected.

10. As far as Writ Petition No. 5690 of 2000 filed by the Management is concerned, the Tribunal has already given liberty

to recover the 25% back wages from the salary grant and it is also the prayer of the Management. As regard the reinstatement, the Teacher has stated that he is not interested in joining the school run by the Management and will be interested only in reinstatement for the purpose of continuity of service for pensionary benefit. In view of this position, Mr. Bodhare states that the Management has no further cause to agitate in this Petition as direction is already given regarding reimbursement from salary grant. The State Government has not challenged this direction. He also submitted that the Management will have no objection regarding continuity of service as the Teacher has made it clear that he does not wish to resume service in their employment. The Management will give necessary discharge certificate for the purpose of continuity of service. Mr. Bodhare in view of the above position seeks leave to withdraw this petition which is disposed off as withdrawn. As regard Writ Petition No. 5690 of 2000 is concerned, for the reasons stated above is stands dismissed. No order as to costs.

11. The Tribunal has in the impugned order has directed that the back wages to be paid within period of two months. There appears to be no stay to the impugned order but since it is stated that the back wages have not been so far paid, they shall be paid as per the direction of the Tribunal within period of two months from today.

12. Both the Petitions are accordingly disposed off. No costs.

(N.M. JAMDAR, J.)